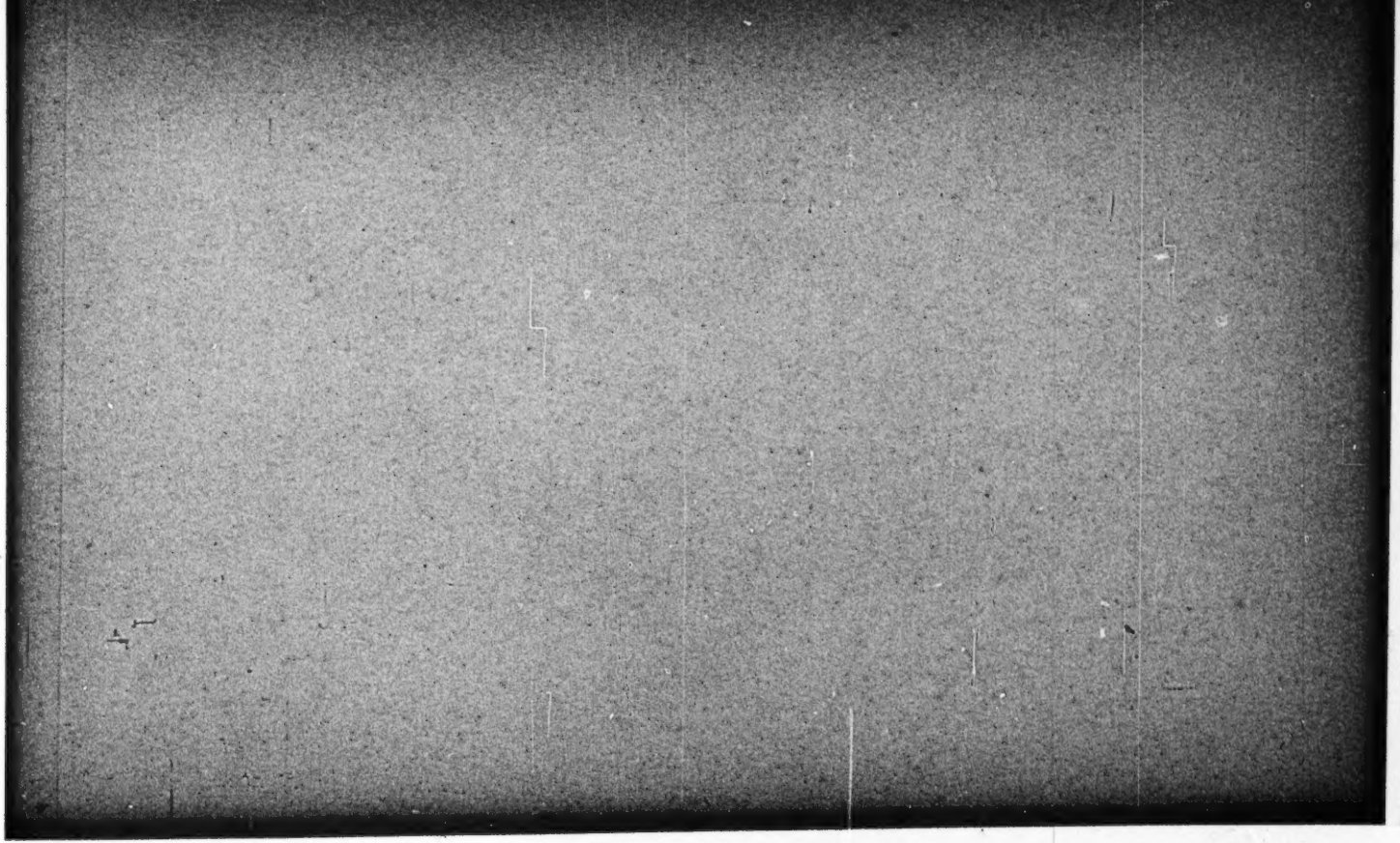

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1908

STEWART S. CORT, ET AL., PETITIONERS

v.

RICHARD A. ASH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

The United States will discuss the following question:

Whether 18 U.S.C. 610, which regulates political contributions in connection with federal elections made by corporations,[1] violates the First Amendment

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[1] Although Section 610 pertains to both corporations and labor unions, for the purposes of this brief we discuss its applicability to corporations only.

or denies corporations or their stockholders equal protection.

INTEREST OF THE UNITED STATES

One of the issues petitioners raise is the constitutionality of 18 U.S.C. (Supp. II) 610, recently reenacted and amended in Title II of the Federal Election Campaign Act of 1971, which prohibits corporations and labor unions from making contributions and expenditures from general funds in connection with any federal election. It provides criminal penalties of up to $5000 in fines for corporations and labor organizations that violate its provisions, and up to $1000 and one year imprisonment for officers or directors who consent to the prohibited contributions or expenditures.

In the present case, a shareholder of Bethlehem Steel Corporation alleged that the directors of Bethlehem had violated Section 610, and sought injunctive relief and compensatory and punitive damages on behalf of Bethlehem, asserting that the statute provides an implied private cause of action. One of the defenses asserted by the directors was that Section 610 is unconstitutional.[2] If the Court reaches that issue (see *infra*, pp. 10-11), its determination would have a significant impact upon the United States with respect to prosecutions under this provision and

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[2] The United States takes no position on the other major question in this case: whether there is a private right of action for violation of Section 610.

perhaps with respect to its efforts to enforce other federal campaign financing laws. See *e.g.*, *United States* v. *Finance Committee To Re-Elect The President*, C.A.D.C., No. 73-1918, decided December 2, 1974; *Pichler* v. *Jennings*, 347 F. Supp. 1061 (S.D. N.Y.); *American Civil Liberties Union* v. *Jennings*, 366 F. Supp. 1041 (D. D.C.), probable jurisdiction noted *sub nom. Staats* v. *American Civil Liberties Union*, 417 U.S. 944.[3]

STATUTES INVOLVED

18 U.S.C. 610 provides:

> *Contributions or expenditures by national banks, corporations or labor organizations.*
>
> It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presi-

[3] The *Pichler* and *Finance Committee* cases involve attacks upon the campaign contribution reporting provisions of Title III of the Federal Election Campaign Act of 1971 (2 U.S.C. (Supp. II) 431-441). *Staats*, currently before the Court, focuses upon Title I of the same Act (47 U.S.C. (Supp. II) 801-805), which regulates campaign spending for communications media advertisement. Section 610 was amended as part of Title II of the Act (18 U.S.C. (Supp. II) 610).

dential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Section 205 of the Federal Election Campaign Act of 1971, 86 Stat. 10, amended Section 610 by adding

at the end of that section the following paragraph (18 U.S.C. (Supp. II) 610):

> As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; non-partisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: *Provided*, That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction.

STATEMENT

Respondent, a shareholder of Bethlehem Steel Corporation ("Bethlehem"), instituted this suit against Bethlehem's directors shortly before the 1972 presidential election, both individually and derivatively on behalf of the corporation. He alleges that the directors violated 18 U.S.C. 610 by using Bethlehem's general corporate funds "to influence the United States electorate to help bring about a Republican Party victory" in the election (A. 8, 11).[1]

The suit was induced by an advertisement paid for by Bethlehem which appeared in many national magazines and whose basic theme, respondent averred, constituted an endorsement of the 1972 Republican Party candidate (A. 21). While the advertisement did not mention any candidate by name, it criticized the "careless rhetoric and accusations that are being thrown around" in the presidential campaign, "their main target being the business community," and referred disapprovingly to a statement "made by a political candidate" (A. 31). The advertisement also indicated that upon request Bethlehem would send the text of the speech given by the Chairman of the Board of Bethlehem (A. 32), from which the advertisement was derived. The full speech made several other disapproving references to "a prominent presidential candidate" and a "campaign based on cynicism and mistrust" (A. 32).

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[1] "A." refers to petitioners' Appendix; "Br." refers to petitioners' brief.

In its opinion denying respondent's motion for a temporary restraining order (A. 19), the district court held that since the Department of Justice had exclusive authority to enforce Section 610, no private cause of action could be implied (350 F. Supp. 227, 231; A. 52-53), and that the advertisement did not constitute an expenditure prohibited by Section 610 because the advertisement did not mention any candidates specifically by name. The court considered it unnecessary to resolve the defendants' First Amendment challenges to the provision.

Petitioners subsequently filed a motion for summary judgment in the district court (A. 79), which was granted without opinion (A. 87). The court of appeals reversed (496 F.2d 416; A. 92), holding that there is a private cause of action for violation of Section 610, and the proscription in Section 610 applies to any expenditure made with a "partisan purpose," that is, made "for the purpose of influencing someone's election to federal office" (496 F.2d at 425; A. 106), even though it did not expressly mention a candidate by name.

The court concluded that because there was a factual dispute whether the Bethlehem advertisement was partisan, the district court erred in granting summary judgment. The court declined to address petitioners' contention that Section 610 was unconstitutional, noting that since the district court had not resolved the issue, it could be reasserted on remand (496 F.2d at 426; A. 108).

SUMMARY OF ARGUMENT

The statutory scheme in 18 U.S.C. 610 comes within the broad power of Congress to enact legislation aimed at preserving the integrity of the electoral process, which includes the authority to prevent the corrupting effect upon politics of unchecked political spending by corporations. Control over corporate political spending has been one historical cornerstone of three-quarters of a century of continued congressional effort to limit the impact of aggregated power upon politics. Many decisions of this Court have recognized the legitimacy of that effort.

The means chosen to limit corporate power in the electoral process, through Section 610, are reasonably calculated to fulfill Congress' legitimate objective without undue effect upon First Amendment rights. The restrictions are narrowly drawn: they permit corporations to make political contributions so long as the funds have been voluntarily contributed by shareholders, and they allow corporate officers to supervise the political funds and decide how they will be spent. They also permit the corporation to expend general non-contributed funds for the purpose of administering and soliciting voluntary contributions.

Section 610 prohibits only the use of general corporate funds in connection with federal elections, because such expenditures have a disproportionate impact upon the electoral process in that they do not necessarily reflect the particular political sentiments of individual investors who are the sources of the

funds. A corporation thereby able to aggregate funds for political purposes which could not otherwise be aggregated on a voluntary basis would have political leverage of a kind unavailable even to organized blocs of partisan contributors. The net effect of Section 610, therefore, is to eliminate this disproportionality and assure that corporate political expenditures represent only those funds voluntarily contributed by shareholders for avowedly political purposes.

The statutory scheme places no restraint upon the First Amendment rights of shareholders to express their political views and associate for political ends. To the contrary, Section 610 furthers First Amendment interests by protecting the rights of shareholders whose political views are either in the minority or at odds with the views of corporate officers, since it prevents the corporation from using general corporate funds for political purposes. Similarly, Section 610 permits corporate officers free reign to express their views, so long as they do not draw upon general corporate funds to do so. Moreover, the statutory scheme only has an incidental effect upon the First Amendment rights of corporate entities.

Nor is the statutory scheme, barring corporate expenditures made from general funds "in connection with any election," unconstitutionally overbroad nor impermissibly vague. Its proscriptions comprehend a range of corporate conduct which is easily identifiable and commonly understood. Any overbreadth is insubstantial in relation to the unquestionably valid

scope of the statute, and the statute is sufficiently definite to give notice of the proscribed conduct.

Finally, contrary to petitioners' assertion, it is no violation of equal protection to hold corporations and labor unions, in Section 610, to a higher standard of behavior than voluntary associations, partnerships, or other unincorporated organizations—none of which poses as great a potential for abuse of the electoral process. In any event, Congress may act selectively, and a prohibition within its power directed at a particular class is not rendered invalid because it does not also reach every other class upon which Congress may constitutionally place similar restrictions.

ARGUMENT

The contention that Section 610 is unconstitutional was made as a defense to a claim by a shareholder that the directors of Bethlehem Steel Corporation violated that section through certain acts done at the time of the 1972 presidential election. Neither the district court nor the court of appeals reached the issue; indeed, in declining to do so, the court of appeals noted that the issue would be open on the remand that it ordered. The petition for certiorari raised the constitutional issue, and this Court granted the petition without limitation.

Although the issue is thus before the Court, under this Court's settled practice of not deciding constitutional questions unless necessary, and particularly when the lower courts have not reached them, we

believe that there is no occasion for the Court to reach the question in this case. Indeed, in *United States* v. *Automobile Workers*, 352 U.S. 567, the Court in a similar situation declined to consider constitutional challenges to Section 610.[5]

If this Court reaches the constitutional question, the validity of the restrictions in Section 610 upon corporate campaign expenditures must be evaluated in light of (1) the broad congressional authority under the Constitution to regulate and control federal elections, which includes the power to prevent their corruption by corporate political expenditures, and (2) the narrow prohibitions of the statutory scheme, which must be viewed in relation to the precise abuses which Congress sought to correct. We shall show that Congress has authority to impose limitations upon corporate political expenditures, and that the restrictions in 18 U.S.C. 610 are constitutional.

---

[5] In both *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 110, and *Pipefitters* v. *United States*, 407 U.S. 385, 399-400, the Court found it unnecessary to reach the constitutionality of Section 610 because it was able to dispose of the cases on non-constitutional grounds. The statute and its predecessors have been upheld in *United States* v. *United States Brewers' Association*, 239 Fed. 163 (W.D. Pa.); *United States* v. *Painters Local Union No. 481*, 79 F. Supp. 516 (D. Conn.), reversed on other grounds, 172 F. 2d 854 (C.A. 2); *United States* v. *Boyle*, 482 F. 2d 755 (C.A. D.C.).

I. THE BOARD POWER OF CONGRESS TO REGULATE FEDERAL ELECTIONS TO PREVENT THEIR CORRUPTION AUTHORIZES A PROHIBITION UPON CORPORATE POLITICAL EXPENDITURES FROM GENERAL CORPORATE FUNDS.

1. Congress has broad power to enact legislation aimed at preserving the integrity of the electoral process.* Starting with *Ex Parte Siebold*, 100 U.S. 371, and *Ex parte Clarke*, 100 U.S. 399, this Court has upheld the authority of Congress to prohibit actions that directly violate the integrity of the election process, such as stuffing ballot boxes or failing to return poll books. In *Ex parte Yarbrough*, 110 U.S. 651, the Court, in upholding a conviction for beating a Negro to prevent him from voting in a congressional election, essayed the broad scope of congressional power to safeguard the federal electoral process, and concluded that:

> If the recurrence of such acts as these prisoners stand convicted of are too common in one quarter of the country, and give omen of danger from lawless violence, *the free use of money in*

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* The authority over congressional elections stems from Article I, Section 4 of the Constitution, which provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations * * *." The authority to protect presidential elections apparently stems from the "necessary and proper" clause of the Constitution (Art. I, Sec. 8, Cl. 18); see *Ex parte Yarbrough*, 110 U.S. 651, 658; *Burroughs and Cannon* v. *United States*, 290 U.S. 534, 545.

> *elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety.*
>
> If the government of the United States has * * * no authority to provide against these evils, * * * then, indeed, is the country * * * at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other. [*Id.* at 667; emphasis added.]

In *Burroughs and Cannon* v. *United States*, 290 U.S. 534, the Court upheld the constitutionality of the Federal Corrupt Practices Act of 1925, 43 Stat. 1070, 2 U.S.C. 241 *et seq.*, which limited the amounts candidates for congressional elections could spend and required the disclosure of contributions to and expenditures by political committees, as applied to the election of presidential and vice presidential electors. In rejecting the contention that the Act could not be applied to that election because under Article II, Section 1 of the Constitution only the States, but not Congress, could thus regulate presidential elections, the Court said (290 U.S. at 545):

> To say that Congress is without power to pass appropriate legislation to safeguard [a Presidential] election from the improper use of money to influence the result is to deny to the nation in a vital particular power of self protection.

In *United Public Workers* v. *Mitchell*, 330 U.S. 75, 78, the Court sustained the congressional power to forbid any employee of the federal executive branch from "taking 'any active part in political

management or political campaigns.'" The *Mitchell* decision was based on *Ex parte Curtis*, 106 U.S. 371, in which "[t]he right to contribute money through fellow employees * * * was held not to be protected by any constitutional provision." 330 U.S. at 97. See also *United States* v. *Wurzbach*, 280 U.S. 396; *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548.

The Court has also sanctioned congressional authority to regulate the political activity of individuals and organizations who are employed by state governments but paid from federal funds, *Oklahoma* v. *United States Civil Service Commission*, 330 U.S. 127; who are on federal premises, *United States* v. *Thayer*, 209 U.S. 39; or who receive or solicit contributions for the purpose of influencing legislation, *United States* v. *Harriss*, 347 U.S. 612; see also, *Egan* v. *United States*, 137 F.2d 369 (C.A. 8), certiorari denied, 320 U.S. 788 (employees of organization chartered or regulated by federal law).

The power of Congress to safeguard "the integrity of [the] basic governmental process [of elections]" (*United States* v. *Harriss*, *supra*, 347 U.S. at 625), includes the power to control corporate political spending. Uncontrolled corporate political expenditure would entail as much an "improper use of money to influence the result" (*Burroughs and Cannon*, *supra*, 290 U.S. at 545) of an election as the use of funds for corrupt purposes. Fifty years ago, during the debates on the Federal Corrupt Practices Act of

1925, Senator Robinson stated (65 Cong. Rec. 9507-9508):

> Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest. It is unquestionably an evil which ought to be dealt with, and dealt with intelligently and effectively.

These problems are no less serious today than they were in 1925. Large corporations have access to funds far beyond the financial resources of most individuals. Were these organizations free to use their resources for political purposes without limitation, there would be a serious danger of corrupting the electoral process.

2. The restriction upon the political power and influence of corporations in Section 610 has been one cornerstone of Congress' continuing "concern for elections 'free from the power of money'" (*United States* v. *Automobile Workers*, 352 U.S. 567, 575). The history of congressional action "to protect the political process from what it deemed to be the corroding effect of money employed in elections by *aggregated power*" (*id.* at 582; emphasis supplied) began almost three quarters of a century ago. President Roosevelt's 1906 message to Congress recommended as the first item of congressional action a law prohibiting political contributions by corpora-

tions. 41 Cong. Rec. 22. Shortly thereafter, in 1907, Congress provided:

> That it shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator. [34 Stat. 864-865.]

As this Court indicated, the aim of this statute "was not merely to prevent the subversion of the integrity of the electoral process. Its underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government" (*Automobile Workers, supra,* 352 U.S. at 575).

Shortly thereafter, Congress enacted a publicity law that required committees attempting to influence the results of congressional elections in two or more states to report all contributions and disbursements and to identify contributors and recipients of substantial sums. 36 Stat. 822. In 1911 Congress enacted the first limitations on spending for congressional campaigns, which also prohibited candidates from promising employment for the purpose of obtaining support. 37 Stat. 25. In 1918 Congress made

it unlawful either to offer or to solicit anything of value to influence voting. 40 Stat. 1013.

The Federal Corrupt Practices Act of 1925, 43 Stat. 1070, codified and revised this legislation. Section 313 of the Act strengthened the 1907 statute by prohibiting "contributions" as well as "money contributions," extending the prohibition on corporate contributions to the election to Congress of Delegates and Resident Commissioners, and penalizing the recipient of any forbidden contribution as well as the contributor.

Fifteen years later, when Congress extended the Hatch Act, 53 Stat. 1147, it imposed further limitations upon political contributions: it set a maximum of $5000 on contributions by a person to any candidate or to any committee supporting him, and limited to $3 million the total expenditures which a political committee could make in any year. 54 Stat. 767. In offering these latter provisions, Senator Bankhead expressed Congress' continuing concern with the corrupting impact of money on politics (86 Cong. Rec. 2720):

> We all know that money is the chief source of corruption. We all know that large contributions to political campaigns not only put the political party under obligation to the large contributors, who demand pay in the way of legislation, but we also know that large sums of money are used for the purpose of conducting expensive campaigns through the newspapers and over the radio; in the publication of all sorts of literature, true and untrue; and for the purpose

> of paying the expenses of campaigners sent out into the country to spread propaganda, both true and untrue.

These restrictions were extended to labor unions in the Labor Management Relations Act of 1947 (61 Stat. 136, 159-160), to mitigate "the undue and disproportionate influence of labor unions upon federal elections" and "to preserve the purity of such elections * * * against the use of aggregated wealth by union as well as by corporate entities" (*United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 134).

The problem of controlling the financing of elections has received continued attention from Congress in the Federal Election Campaign Act of 1971 (86 Stat. 3, 47 U.S.C. (Supp. II) 801, *et seq.*) and the 1974 amendments to that Act (Public Law 93-443, 88 Stat. 1263, *et seq.*).

In view of Congress' continuing efforts to limit the influence of money upon the political process, and the many decisions of this Court which have recognized the legitimacy of those efforts, Congress certainly has authority to control what has been viewed for three quarters of a century as a primary source of election abuse: corporate political contributions. The only issue is whether the means chosen to control the abuse are reasonably calculated to do so, without undue effect upon First Amendment rights. "The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Con-

gress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone" (*Burroughs and Cannon, supra*, 290 U.S. at 547-548).

As we now show, the restrictions imposed upon corporations by Section 610 comprise an appropriate and reasonable method for "protect[ing] the political process from * * * the corroding effect of money employed in elections by aggregated power" (*Automobile Workers, supra*, 352 U.S. at 582).

II. THE LIMITATIONS UPON CORPORATE POLITICAL CONTRIBUTIONS IN 18 U.S.C. 610 ARE CONSTITUTIONAL BECAUSE THEY ARE A REASONABLE METHOD OF PROTECTING THE ELECTORAL PROCESS.

A. The Statute does not violate the Constitutional Rights of Corporations, their Officers, or their Shareholders.

Petitioners predicate their constitutional argument on the proposition that Section 610, as applied, constitutes a "blanket prohibition of contributions and expenditures by labor unions and corporations" (Br. 61). To the contrary, the limits embodied in Section 610 are narrowly drawn and are reasonably calculated to avoid the specific abuses at which Congress aimed. Rather than constituting "blanket prohibition" on corporate political expenditures, they merely assure that such political expenditures repre-

sent the voluntary contributions of individual shareholders.

Section 610 makes it unlawful for any corporation or any labor union

> to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices * * *.

In *Pipefitters* v. *United States*, 407 U.S. 385, 401, this Court held that this prohibition does not apply to contributions or expenditures derived from *voluntarily* financed union political funds segregated from other union funds. The Court also stated in *Pipefitters* that solicitation by union officials is permissible, so long as it is conducted under circumstances plainly indicating that donations are for a political purpose and that those solicited may decline to contribute without loss of job or any other reprisal within the institution's power. *Id.* at 414. Moreover, the Court construed Section 610 to permit union officials to decide how the monies raised will be spent, and to control the voluntarily contributed funds. *Id.* at 415.

The same principles, we submit, are equally applicable to corporations. That is, the statute does not bar corporate political contributions which represent funds voluntarily contributed by stockholders for that

purpose, nor does it bar corporate officials from soliciting stockholders to make such contributions.

Section 205 of the Federal Election Campaign Act of 1971, 86 Stat. 10, confirmed that "§ 610 does not apply to union and corporate contributions and expenditures from political funds financed in some sense by the voluntary donations of employees [and stockholders]" (*Pipefitters*, *supra*, 407 U.S. at 409) by amending Section 610 to include the following paragraph:

> As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; *but shall not include communications by a corporation to its stockholders and their families* or by a labor organization to its members and their families *on any subject; non-partisan registration and get-out-the-vote campaigns by a corporation aimed at its stocksolders and their families, or* by a labor organization aimed at its members and their families; *the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation* or labor organization: *Provided*, That it shall be unlawful

> for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction. [Emphasis supplied.]

The 1971 amendment also excludes from coverage corporate funds used for "the establishment, administration, and solicitation of contributions to a separate segregated fund * * *."

Thus, a corporation may use funds for political purposes which stockholders voluntarily contributed and solicit contributions for political purposes from shareholders and their families. Indeed, the amended statute expressly permits political communication by a corporation to its shareholders and their families, and non-partisan registration and "get-out-the-vote" campaigns by a corporation aimed at its shareholders and their families.

The statutory scheme of Section 610 thus permits extensive political communication by corporations: corporations may send political advertising to their shareholders and solicit them for political contributions; corporations may also communicate their political views to the public at large as long as the communications are financed from the voluntary contributions of individual shareholders. The statute there-

fore is narrowly drawn to avoid the precise evil about which Congress was concerned—the undue influence upon the electoral process that the use of general corporate funds is likely to create.

The constitutional issue is thus a narrow one: whether a corporation, which is organized for other than political purposes, may be barred from making political contributions and expenditures from its general funds.

One of Congress' concerns about unlimited corporate spending was the disproportionate impact it would have upon the political process—exceeding the abilities of any individual or bloc of individuals to have their voices heard. Corporate political expenditures drawn from general corporate funds have a disproportionate impact simply because such expenditures do not necessarily reflect the political views of the individual shareholders who are the sources of the funds. A corporation that was thereby able to aggregate funds for political purposes which could not otherwise be aggregated on a voluntary basis would have political leverage of a kind unavailable even to organized blocs of partisan contributors. Indeed, one reason for the restrictions embodied in Section 610 was "the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders" (*United States* v. *Congress of Industrial Organizations*, *supra*, 335 U.S. at 113). See Hearings before the House Committee on the Election

of the President, 59th Cong., 1st Sess. 76; 40 Cong. Rec. 96.

The net effect of Section 610 is to eliminate this disproportionality and assure that corporate political expenditures represent only those funds voluntarily contributed by shareholders for avowedly political purposes. The scheme comprises a reasonable means of limiting undue corporate leverage in the political process without encroaching upon the First Amendment rights of shareholders or corporate officers, and only incidentally affecting the First Amendment rights of corporations.

1. *The First Amendment Rights of Shareholders.*

As noted above, Section 610 permits individual shareholders to make voluntary political contributions through the corporation. It therefore imposes no restraint upon their right to express political views.

Nor does Section 610 restrict the collective voice of groups of shareholders who share the same political sentiments. It does not bar the formation of voluntary political organizations by shareholders to express their political views, even by the pooling of money they voluntarily furnish for the purpose of making political contributions. Indeed, by preventing the use of corporate funds to support political candidates whom some stockholders may oppose, the statute furthers First Amendment interests.

The Amendment rests on the premise "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the

welfare of the public." *Associated Press* v. *United States*, 326 U.S. 1, 20. In preventing shareholders from using corporate funds to support candidates opposed by minority shareholders (and corporate management from deciding, on behalf of all shareholders, which candidate to support), the statute protects, rather than restricts, the First Amendment freedoms of individual shareholders.

As Congressman Williams of Mississippi commented during the hearings on the original Act of 1907:

> [N]o corporation has the right, and no board of directors of a corporation and no manager of a corporation has the right, to embezzle the money belonging to the stockholders of the corporation and to divert it from its legitimate use to a purpose for which the company was not chartered by appropriating it to Democratic, Republican, Populist, Socialist, or any other campaign fund. [Hearings before the House Committee on the Election of the President, 59th Cong., 1st Sess. 76; 40 Cong. Rec. 96.]

2. *The First Amendment Rights of Corporate Officers.*

Section 610 does not abridge the First Amendment rights of corporate officers to express their political views. Contrary to petitioners' assertion, Section 610 does not have a "chilling effect" upon the exercise of those rights (Br. 68), and it does not, as the *amicus* maintains, entail a prior restraint designed "to silence a corporate officer" (*Amicus* Br. of the Chamber of Commerce of the United States, 32).

Petitioner Cort, the Chairman of the Board of Bethlehem Steel, was free to speak out against, as he put it, the "false statements" and "outrageous accusations" about the business community made by "a political candidate" in the 1972 presidential election (App. 31), and he was free to advertise his message so long as he did not spend general corporate funds to do so. He was also free to publish a pamphlet criticizing the views of "a prominent presidential candidate" (App. 32), so long as he did not finance the pamphlet from unsegregated corporate funds.

The sole restriction upon corporate officers in Section 610 is that they cannot use for political purposes unsegregated corporate funds which were not expressly contributed by shareholders for such purposes. Section 610 puts corporate officers on the same footing as everyone else under the First Amendment—they can make their own political contributions and expenditures out of their own pockets but cannot draw upon general corporate funds for that purpose.

3. *The First Amendment Rights of Corporations.*

As noted above, Section 610 permits corporations to make political expenditures from a segregated political fund voluntarily contributed by shareholders. The statute also permits corporations to establish and administer such a fund, and to solicit voluntary contributions to the fund, even if the cost of administering and soliciting derives from general corporate funds. The corporation also may conduct a nonpartisan registration campaign aimed at its share-

holders. Beyond these types of political participation, however, the corporation as an entity may not venture.

The limits upon corporate political expenditures prescribed in Section 610 do not unconstitutionally restrain the First Amendment rights of corporations. As this Court stated in *Younger* v. *Harris*, 401 U.S. 37, 51:

> Where a statute does not directly abridge free speech, but—while regulating a subject within the state's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so. [Citations omitted.]

That standard, equally applicable to the federal government, is satisfied in the present case. The statute "is unrelated to the suppression of free expression" (*United States* v. *O'Brien*, 391 U.S. 367, 377). To the contrary, its purpose and effect is to further free expression by preventing the disproportionate influence that corporations—as entities apart from their shareholders and officers—could exert upon the political process by using general corporate funds to support particular candidates.

A corporation is subject to much greater regulation than individuals, and the scope of permissible governmental control over it is necessarily broader than it is with regard to individuals. As this Court

said in *United States* v. *Morton Salt*, 338 U.S. 632, 651, 652 (dealing with Fourth and Fifth Amendment challenges to the corporate reporting requirements of the Federal Trade Commission Act):

> [C]orporations * * * are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favor from government often carry with them an enhanced measure of regulation.
>
> * * * * *
>
> [T]he disparity between artificial and natural persons is so significant that differing treatment can rarely be urged as an objection to a particular construction of a statute.

See also *Orient Insurance Co.* v. *Daggs*, 172 U.S. 557, 561; *Paul* v. *Virginia*, 8 Wall. 168.

This Court repeatedly has upheld over First Amendment objections regulatory schemes which restrict corporate communication so long as they do not discriminate against communications media. See, *e.g.*, *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103; *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Company*, 335 U.S. 525; *Lorain Journal Company* v. *United States*, 342 U.S. 143; *National Labor Relations Board* v. *Virginia Electric and Power Company*, 314 U.S. 469.

As noted, Section 610 is not directed against speech at all. It simply bars corporate political contributions, whatever their purpose—whether used to pay

the rent of a candidate's office or for a newspaper advertisement advocating his election. The effect of the statute upon the corporation's First Amendment rights is incidental. In view of the strong public interest in protecting the electoral process from the corrupting influence of the use of general corporate funds for political purposes, such incidential effects do not unconstitutionally abridge the corporation's First Amendment rights.

In *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, this Court recently upheld under the First Amendment the constitutionality of the prohibition in the Hatch Act against partisan political activity by federal employees. The Court's analysis and reasoning is equally applicable here.

The Court first essayed the history of attempts by Congress to insure "that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited" (*id.* at 557). The Court then held that the "balance [Congress] has so far struck," of barring partisan political activity by government employees while permitting them to participate fully in the electoral process, is "sustainable by the obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act" (*id.* at 564). The Court stated (*id.* at 567): "[n]either the right to associate nor the right to participate in political activities is absolute in any event. * * * *Nor are the management, financing, and conduct of political cam-*

paigns wholly free from government regulation" (footnote and citations omitted; emphasis supplied).

Section 610 similarly represents a "sustainable" balance, consistent with the First Amendment. Indeed, the Hatch Act—barring federal employees from all partisan political activity—entails a far more onerous restriction than Section 610, which imposes no restraints upon individuals acting alone or in groups. It merely restricts political contributions and expenditures by corporate entities *separate and apart* from the shareholders and officers of whom they are comprised. The Hatch Act, on the other hand, directly restrains the partisan political activities of individuals.

B. Section 610 is Neither Unconstitutionally Overbroad Nor Unconstitutionally Vague.

Contrary to petitioners' further contentions, Section 610 is neither unconstitutionally overbroad on its face nor unconstitutionally vague. Its proscription against contributions or expenditures made "in connection with any elections" comprehends a range of corporate conduct which is easily identifiable and well understood. The statutory scheme evidences the "precision of regulation" which this Court has said to be the "touchstone in an area so closely touching our most precious freedoms." *National Association for the Advancement of Colored People* v. *Button*, 371 U.S. 415, 438. The statute is a narrow prohibition precisely directed against the evil sought to be avoided—disproportionate corporate influence

over elections through political contributions—while permitting individuals associated with the corporation fully to exercise their First Amendment rights of speech and association.

This Court has repeatedly refused to strike down a statute as overbroad on its face where there were a substantial number of situations to which it could be validly applied. "Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute * * * covers a whole range of easily identifiable and constitutionally proscribable * * * conduct * * *'" (*Parker* v. *Levy*, 417 U.S. 733, 760, quoting from *Civil Service Commission* v. *Letter Carriers*, *supra*, 413 U.S. at 580-581). And as the Court recognized in *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615, "where conduct and not merely speech is involved" the overbreadth must "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

The provision in Section 610 barring contributions or expenditures made by corporations "in connection with any election" embraces a clear range of constitutionally proscribable conduct. While there could be marginal applications infringing upon First Amendment values—where, for example, corporate advertising dealt solely with issues and never impliedly referred to a candidate—such potential overbreadth is insubstantial in relation to the unquestionably valid scope of the statutory scheme.

The phrase "in connection with any election" is not impermissibly vague. The words define situations in which corporations might use their resources to influence the electoral process with as great precision as the nature of the subject matter permits. They reach a precise and readily ascertainable type of conduct, see *United States* v. *O'Brien*, *supra*, 391 U.S. at 381, and convey a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more." *United States* v. *Petrillo*, 332 U.S. 1, 8.

In *Boyce Motor Lines* v. *United States*, 342 U.S. 337, the Court noted that because of the necessary imprecision of language, only a "reasonable degree of certainty can be demanded" of any legislation. As it observed:

> A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes peril-

> ously close to an area of proscribed conduct shall take the risk that he may cross the line. [342 U.S. at 340; footnotes omitted.]

Moreover, "if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise" (*United States* v. *Harriss*, 347 U.S. 612, 618).

Here the statute is clear in prohibiting what was done in this case—the financing of public advertisements and pamphlets which criticized the views of one of the major candidates (referred to, but not named) in the 1972 presidential election. The company had financed political advertising—a direct "expenditure" made "in connection with" a presidential election. Petitioners were amply warned that their advertisement and pamphlet critical of a political candidate in all but name were within the boundary of proscribable conduct.

Moreover, the phrase "in connection with any election" derives meaning from the context in which it is used and the statutory design. The purpose of the statutory scheme is to control and limit corporate influence upon the electoral process. An expenditure or contribution is made "in connection with any election" if it is intended and designed to support or discredit a particular candidicy, that is, if one of its purposes is to urge and encourage the electorate to vote in a certain way. The words are given greater specificity by the remainder of

the statutory scheme, which exempts non-partisan registration and "get-out-the-vote" campaigns by a corporation aimed at its shareholders and any communications by a corporation to its stockholders and their families.

This Court has upheld, against vagueness challenges, phrases in other regulatory statutes implicating First Amendment rights that were no more definite and specific than the words "in connection with an election." See, *e.g.*, *United States* v. *Wurzbach*, 280 U.S. 396 (upholding the provision of the Federal Corrupt Practices Act prohibiting any person from receiving money "for any political purpose whatever"); and *United States* v. *Harriss*, *supra* (upholding the provision of the Federal Regulation of Lobbying Act prescribing certain requirements for any person who receives money "to be used principally to aid, or the principal purpose of which person is to aid" in "influenc[ing] directly or indirectly, the passage or defeat of any legislation by the Congress of the United States").

In *Civil Service Commission* v. *Letter Carriers*, *supra*, the Court upheld the constitutionality of the prohibition in the Hatch Act against federal employees "taking an active part in political management or in political campaigns." The Court stated, in words equally applicable to the instant case (413 U.S. at 577-579):

> There might be quibbles about the meaning of [language in the statute and regulations]; but there are limitations in the English language

with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

C. Section 610 Does Not Deny Equal Protection in Violation of the Fifth Amendment.

Petitioners contend that, in singling out corporations and labor unions, Section 610 denies equal protection in violation of the Due Process Clause of the Fifth Amendment. Petitioners maintain that Section 610 does not prohibit voluntary associations, partnerships or unincorporated organizations from making political contributions in connection with federal elections. But as this Court has held, Congress may act selectively, and a prohibition within its power directed at a particular class is not rendered invalid because it does not also reach every other class upon which Congress may constitutionally place similar restrictions. *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4; *United States* v. *Petrillo*, *supra*, 332 U.S. at 8-9; *Sproles* v. *Binford*, 286 U.S. 374, 396.

Moreover, it is rational to hold corporations and labor unions to a different and more stringent standard than other associations. "Congress may have considered that the volume or proportion of unincorporated business or the relatively small size of in-

dividually owned enterprises * * * made it possible to omit persons [in such entities] from duties and penalties imposed on artificial combinations of capital." *United States* v. *Morton Salt, supra*, 338 U.S. at 651. Indeed, as we have already stressed, Section 610 does not prohibit shareholder majorities from expressing their collective political sentiments through voluntary political organizations. Such voluntary associations, partnerships or unincorporated organizations simply do not pose the same possibility of disproportionate influence upon the electoral process as corporations or labor unions which are able to aggregate funds not otherwise volunteered for political purposes.

CONCLUSION

For the foregoing reasons, Section 610 is consistent with the First and Fifth Amendments.

Respectfully submitted.

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